Honda of America Manufacturing, Inc. *and* **Donald Alan DeWald Jr.** Case 8–CA–30343

July 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

The issue presented in this case is whether comments about company personnel the Charging Party made in the course of activity protected by the Act were so offensive that the otherwise protected activity became unprotected.[1]

On the basis of the entire stipulated record and the briefs in this case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation engaged in the manufacture of automobiles and motorcycles with a place of business in East Liberty, Ohio. Annually, the Respondent sells and ships from its East Liberty facility goods valued in excess of $50,000 directly to points outside the state of Ohio. The parties stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

One of the Respondent's core operating philosophies is respect for the individual. The associate handbook, in a message from the Respondent's president, states,

> The management policy at Honda of America has at its core the belief that the human being is the most important asset in a manufacturing operation. Under this policy each Associate is to be treated fairly, equally, and with respect.

The Respondent has at various times reiterated this policy through memoranda to its employees.

Rule 13 of the Respondent's standards of conduct states, "Associates must not . . . [u]se abusive or threatening language to/or about fellow Associates or create an intimidating, hostile, or offensive working environment." The Respondent believes that this rule furthers both its legal duties[2] and its operating philosophy of respect for the individual. The Respondent intends rule 13 to be stricter than Federal and state requirements. The Respondent has issued numerous disciplinary actions to its employees for violations of the rule.

For some time, the Charging Party, employee Donald Alan DeWald Jr., has engaged in distributing literature at the Respondent's facility, the primary purpose of which has been to espouse his support for unions and to object to various terms and conditions of employment maintained by the Respondent. During his employment with the Respondent, DeWald has been disciplined a number of times, including several disciplinary actions taken for violations of rule 13. Two previous rule 13 disciplines occurred in May 1996 and are the subject of an unfair labor practice charge filed by DeWald in Case 8–CA–28313.[3] From June 1996 to October 27, 1998,[4] DeWald continued to distribute prounion literature without incident.

On May 18 DeWald sent a communication to Kim Ryan, manager of the Respondent's benefits department, in which DeWald claimed that information about compensation in a booklet given to employees was inaccurate. Ryan replied in a written response dated July 6 that the booklet was not inaccurate. Employee Laura Solomon, who worked in the benefits department, met with DeWald on July 9 to give him Ryan's response. Solomon met on two more occasions in July with DeWald, who claimed that Ryan's response was inadequate and requested a meeting with Ryan. Ryan declined to meet with DeWald because she believed his concerns had been fully addressed.

[1] The General Counsel issued the complaint on December 16, 1998. The complaint alleged that the Respondent violated Sec. 8(a)(3) and (1) by disciplining and suspending the Charging Party. On December 28, 1998, the Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint, and denying that it had violated the Act.

On October 15, 1999, the parties filed with the Board a stipulation of facts and a motion to transfer this case to the Board; agreed that the charge, the complaint, the answer, the stipulation, and the exhibits attached to the stipulation shall constitute the entire record in this proceeding; and waived a hearing before and decision by an administrative law judge. On February 4, 2000, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a Decision and Order. The Respondent and the General Counsel filed briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent is subject to State and Federal civil rights laws that prohibit unlawful discrimination, which includes the requirement that the Respondent maintain a work atmosphere that is free of harassment and is not hostile, intimidating, or offensive to employees. See, e.g., Title VII, Civil Rights Act of 1964, 42 U.S.C. Sec. 20000e et seq.

[3] See *Honda of America Mfg.,* 334 NLRB No. 98 (2001) (finding that DeWald was lawfully disciplined in May 1996).

[4] All subsequent dates refer to 1998, unless otherwise indicated.

On October 20 DeWald authored and distributed a document entitled "Honda vs. The Calendar." In this document, in which he repeated his claim that the booklet was inaccurate and described his meetings with Solomon, DeWald made the following statements about Solomon and Ryan on a page entitled "It's Not A Mistake, It's A Lie":

> Laura . . . hadn't even been here long enough to have a benefit booklet of her own. The person Honda used to address this concern was someone who had no knowledge or hands on experience with the matter at hand . . . . I brought my benefit booklet into the next meeting and showed Laura, to her satisfaction, that errors were indeed made by the Benefits dept. The next meeting, she informed me that Ms. Ryan would not openly admit the mistakes[.] . . Either Laura was not thoroughly conveying my facts to Ms. Ryan, or Ms. Ryan was not smart enough to figure out simple math[.]

The Respondent believed that the above-quoted comments were inappropriate personal attacks on Ryan and Solomon, insinuated they were untruthful and unethical, and disparaged their intelligence and competence, in violation of rule 13. Based on the statements in "Honda v. The Calendar" that the Respondent found offensive, the Respondent issued a manager-level counseling and 3-day suspension to DeWald on October 27. In the counseling document, the Respondent stated that DeWald "has been counseled for similar violations of [rule 13] in the past and has been warned that future actions would result in disciplinary action."

B. The Contentions of the Parties

The General Counsel contends that DeWald's "Honda vs. The Calendar" constituted protected activity and that the comments regarding Ryan and Solomon did not cause DeWald's writing to lose its protected status. The Respondent contends that DeWald's comments about company personnel in "Honda v. The Calendar" were offensive, inappropriate, and demeaning to the individual, in violation of rule 13, and should not be considered protected activity.

C. Discussion

The subject matter of "Honda v. The Calendar" was employee compensation, specifically, DeWald's belief that the employee booklet describing total compensation was misleading. It is undisputed that the publishing of his views regarding employee compensation is protected conduct. Indeed, the Respondent concedes this point in its statement of position attached to the parties' stipulation of facts. Thus, the issue before us is whether "Honda v. The Calendar" lost its otherwise protected status because of personal attacks on company personnel contained in the publication.

The Supreme Court has placed its imprimatur on the principle that our Act protects language during protected activity that "might well be deemed actionable per se in some state jurisdictions." *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966). "Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Id. (citation omitted). Such "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

The protection that our Act provides employee verbal and written expressions during the course of protected activity is not without limitation. Otherwise protected activity may become unprotected "if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language." *American Hospital Assn.*, 230 NLRB 54, 56 (1977). Nonetheless, "[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn*, supra at 63.

At issue in this case are DeWald's above-quoted statements about individuals in the Respondent's benefits department. DeWald no doubt questioned the intelligence and truthfulness of the individuals he named. DeWald's statements, however, were linked to his protected message: He was expressing his belief that the individuals responsible for addressing his concerns about the Company's employee booklet did not have the experience, knowledge, or capability to understand the complexity of the benefits described in the booklet. We can find nothing in these statements or in the parties' stipulation that would warrant finding them deliberate or reckless untruths that would render the otherwise protected activity unprotected.

The Respondent argues that DeWald's comments should be considered more egregious because they were directed at a fellow employee, as well as management. The Respondent cites no precedent in which this distinction was of legal significance. Given the linkage of even DeWald's statements to his protected message, we cannot agree that the distinction the Respondent draws should have any bearing on our conclusion.

Based on the above precedent, we find that DeWald's authoring and distributing of "Honda vs. The Calendar" was protected activity and that the comments about company personnel contained therein were not so offensive as to deprive DeWald's activity of the protection guaranteed by Section 7 of our Act. We therefore find that the Respondent's disciplining and suspending of DeWald for

those comments violated Section 8(a)(3) and (1). The October 27 counseling document refers to "similar violations of [rule 13] in the past," as well as the statements the Respondents finds offensive in "Honda v. The Calendar." In the companion case we issue today, we are finding the Respondent's imposition of discipline for those "similar violations" to be lawful. Nevertheless, we do not believe this is a mixed motive case that needs to be analyzed under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 ((1982). First, both parties agree that the question is simply whether DeWald's statements in "Honda v. The Calendar" should deprive him of protection under the Act. Further, the Respondent concedes in the instant case that it "would not have disciplined [DeWald] but for the personal attacks" in "Honda v. The Calendar."

CONCLUSION OF LAW

By issuing disciplinary action, consisting of a manager-level counseling and a 3-day suspension, to employee Donald Alan DeWald Jr. on October 27, 1998, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward DeWald, we shall order the Respondent to make him whole for any wages and benefits lost as a result of his October 27, 1998 suspension, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to the October 27, 1998 discipline and suspension.

ORDER

The National Labor Relations Board orders that the Respondent, Honda of America Manufacturing, Inc., East Liberty, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Taking disciplinary action, by issuing manager-level counseling and suspending employees, because they engage in protected union or concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Donald Alan DeWald Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and suspension, and within 3 days thereafter notify Donald Alan DeWald Jr. in writing that this has been done and that the discipline and suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its East Liberty, Ohio facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 1998.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER WALSH, concurring.

In my dissenting opinion in *Honda of America Mfg.*, 334 NLRB No. 98 (2001), issued today, I set forth the reasons why communications occurring during the course of otherwise protected activity should remain likewise protected unless found to be "so flagrant, violent, or extreme as to render the individual unfit for further service." Id., slip op. at 4. Applying that high stan-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dard here, I concur in my colleagues' finding that the Respondent unlawfully disciplined the Charging Party for statements contained in "Honda v. The Calendar."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT take disciplinary action, by issuing manager-level counseling and suspending employees, because they engage in protected union or concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Donald Alan DeWald Jr. whole for any loss of earnings and other benefits resulting from his discipline and suspension, less any net earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and suspension and, WE WILL, within 3 days thereafter, notify Donald Alan DeWald Jr. in writing that this has been done and that the discipline and suspension will not be used against him in any way.

HONDA OF AMERICA MANUFACTURING, INC.